63

No. (1)

Supreme Court, U.S.
FILED

07-170 JUL 30 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

PATRICIA W. FROMAL,

Petitioner,

v.

**TECHNICAL ADVISORY SERVICE,
THE TASA GROUP, INC.,
CHARLES RAWLING, MD,
JOSEPH BERNSTEIN, MD
HOFHEIMER NUSBAUM, PC,
LISA BERTINI and WILLIAM, F. DEVINE,**

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

**Patricia W. Fromal
Pro Se Petitioner
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QUESTIONS PRESENTED

1. Is the denial by the Supreme Court of Virginia of a petition for appeal of a judgment of the Circuit Court of the City of Hampton on a Third Party Motion for Judgment made upon refusal to grant a timely motion for a non-suit made under Code of Virginia Section 8.01-380 a denial of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Is the denial by the Supreme Court of Virginia of a petition for appeal of a judgment of the Circuit Court of the City of Hampton made without notice in the amount of $4,550 based on false representations concerning admissions made to the Court by counsel and dismissal of counterclaim based on said false representations a denial of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Patricia W. Fromal

RESPONDENTS

Technical Advisory Service,

THE TASA GROUP, Inc.

Charles Rawling, MD

Joseph Bernstein, MD

Hofheimer Nusbaum, PC

Lisa Bertini

William F. Devine

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	11
APPENDIX	13

TABLE OF AUTHORITIES

	Page
Cases	
Alderman v. Chrysler Corp., 480 F Supp. 600 (E. D. Va. 1979	7
Bremer v Doctor's Bldg. Partnership, 251 Va. 74, 465 S. E. 2d 787 (1996)	6
McManama v. Plunk, 250 Va. 27, 458 S. E. 2d 759.	6, 7
Nash v Jewell, 227 Va. 230, 315 S. E. 2d 825 (1984)	6
Code of Virginia	
8.01-380 (B)	6
Title 8.01-670	6
Rules of the Supreme Court of Virginia	
3:A:21(b),	8
Constitution of the United States	
Amendment 5	11
Amendment 14	11

JURISDICTION

This case comes to the Supreme Court of the United States as a petition for a writ of certiorari on a final order of the Supreme Court of Virginia entered on May 1, 2007.

STATEMENT OF THE CASE

The is an appeal from an order of the Supreme Court of Virginia (Exhibit No. 1) denying Petitioner an appeal of the Order of the Hampton Circuit Court which dismissed the case on Summary Judgment for failure to respond to Admissions which were never sent to petitioner.

In July of 1999, Petitioner went to Busch Gardens with her husband, son and fifteen year old granddaughter. She and her granddaughter rode a ride commonly known as The Spider. At the end of the ride it stopped too high to exit safely, in excess of three feet above the ground. Petitioner tried to signal to the operator of the ride from her seat. Instead of lowering the bucket the operator announced over the loudspeaker that they were to exit. Petitioner's granddaughter jumped off. New riders were loading. When Petitioner saw that the operator was going to do nothing, she jumped off, landing on her heel injuring her back. Petitioner was taken to the emergency room of Williamsburg Community Hospital by her husband. As a result of that fall petitioner's spinal cord in permanently damaged and she will be under the care of a pain specialist for the rest of her life.

Petitioner brought suit against Busch Entertainment, Inc. in federal court Answers were filed, demurrers disposed of and pre-trial motions begun. Petitioner filed a list of her witnesses, which included her treating physicians. Busch objected to the physicians, saying expert witnesses were required. At a pre-trial hearing Magistrate James Bradbury ruled it was a medical case and he was going to dismiss it unless Petitioner obtained expert witnesses.

Petitioner argued that it was a tort case for Busch's negligence in the maintenance of the equipment and her treating physicians should be allowed to testify as to her injuries. The magistrate judge disagreed. Objections to the magistrate's ruling were filed, but never addressed by the trial judge.

In response to Judge Bradbury's ruling Petitioner contacted Plaintiff, who put Petitioner in touch with Drs. Joseph Bernstein and Charles Rawlings. Petitioner paid Plaintiff over $7,000 for the review of the records and a written opinion. Dr. Rawlings failed to timely file his report. Petitioner paid an additional $4,300 for the deposition of Dr. Bernstein in which Dr. Bernstein stated that he had not read the medical reports sent to him prior to his December 27, 2002 written opinion to the court. Dr. Bernstein's and Dr. Rawlings failure to perform the duties of an expert witness irreparably damaged the petitioner's federal action. Petitioner stopped payment of the $4300 check, resulting in the instant suit. Evidence showed that there were ex-parte communications between the expert witnesses contracted with petitioner and opposing law firm resulting in a Third Party Motion for Judgment.

After service of a Warrant in Debt by the initial respondent, petitioner filed a Counterclaim to Plaintiff's suit. The following paragraphs from the counterclaim set forth the reasons for not paying the fee, which is the basis of respondent's suit:

Due to the negligence of the expert witnesses and legal malpractice of the attorneys, petitioner, as Third Party Plaintiff filed a suit against Charles Rawlings, MD, Joseph Bernstein, MD, Hofheimer Nusbaum, PC, Lisa A. Bertini and William F. Devine.

04-03-03 (pg 1 Trial Record)) **Warrant in Debt.** This was filed in the Hampton General District Court.

04-03-03 (pgs 3-4) **Application for Removal** This action removes the case to the Circuit Court.

04-24-03 (pgs 8-15) **Answer and Counter Claim** Petitioner filed a four count counter claim seeking $20 million dollars in actual damages representing the amount sued for in the Busch Entertainment suit.

05-15-03 (pgs 16-26) **Third Party Motion for Judgment** Petitioner filed a third party motion for judgment against Charles Rawling, MD, Joseph Bernstein, MD, Hofheimer Nusbaum, PC, Lisa A. Bertini, and William F. Devine, paying the Clerk's fee of $150.

05-16-03 (pgs 27-28) **Demurrer.** Initial respondent filed a demurrer to the counter claim.

Various pleading between August 12, 2003 and May 12, 2004 were filed, several pleadings because the respondent failed to appear for hearing and failed to timely file pleading or draft orders. A motion for continuance for one noticed hearing was because pro se litigant was not consulted on the date and had a prepaid travel cruise scheduled out of the country.

01-08-04 **Trial on Respondent's First Demurrer.** Demurrer was dismissed.

02-05-04 (pgs 45-48) **Agreed Motion for Leave to File Late Pleadings** was granted to initial respondent.

05-19-04 (pgs 94-97) **Agreed Motion for Leave to File Late Pleadings** was resigned because respondent had failed to comply with its' own order. And an **Order Dismissing Demurrer.** This was first Demurrer of initial respondent.

Between 05-21-04 and 8-18-04 Pleadings were filed concerning the Third Party Motion for Judgement and the court found in favor of the respondents, ignoring the taking of a non-suit. Initial respondent for the counter claim filed motions and was allowed to participate by phone conference, having failed again to appear. But no ruling could be made on his motions as no notice had been given.

06-07-04 **initial respondent's second Demurrer.**

10-05-04 (pg.153-154) **Answer to initial respondent's second Demurrer.**

10-07-04 (pgs 155-156) **Order.** This order dismisses the Third Party Motion for Judgment ignoring the timely taking of a non-suit.

10-19-04 (pgs 157-165) **Motion for Rehearing.** Petitioner timely files for a rehearing on the order of 10-07-04. This motion for rehearing was never addressed.

11-08-04 (pgs 166-169) **Notice of Appeal** Petitioner could not perfect the appeal because the Petition for a Rehearing was never addressed.

Not being able to file an appeal, Petitioner filed an Application for Extraordinary Writ of Mandamus and Writ of Prohibition with the Supreme Court of Virginia to force the trial court to address the Petition for a Rehearing. This was denied.

11-10-04 (pg 178-179) **Order Sustaining Plaintiff's Demurrer in part and Overruling in Part.**

12-17-04 (pg 180) Notice of Hearing on the attached Motion.

12-17-04 (pg181-184) Plaintiff's Motion For Summary Judgment and Motion to Dismiss Counterclaim. Attached to this motion is another Plaintiff's Motion For Summary Judgment and Motion to Dismiss Counterclaim.

02-07-06 (pgs 185-186) **Praecipe**. By which respondent says that all discovery is complete and respondent is ready for trial.

04-18-06 (pg 180) **Notice** Respondent gives notice of pre-trial conference.

05-04-06 (pgs 188-192) **Scheduling Order.** Trial is set for 08-18-06.

05-05-06 (pg 193) **Order of Referral** the case is referred to the Honorable Walter J. Ford for mediation and scheduling.

06-20-06 Hearing of respondent's Motion for Summary Judgment filed 12-20-04 is heard without notice.

06-20-06 (pgs 197-199) **Notice of Removal** Petitioner gives notice of removal to Federal Court before hearing

07-07-06 (pgs 200-201) **Order** The Court grants the motion for summary judgment and dismisses the counterclaim.

08-07-06 (pgs 202-205) **Notice of Appeal** Petitioner files notice of appeal to the Supreme Court of Virginia.

09-05-06 Transcript filed

09-11-06 **Notice of filing Transcript** of Hearing of 6-20-06.

09-18-06 **Petition for Appeal**

REASONS FOR GRANTING THE PETITION

1.

Section 8.01-380 (B) of the Code of Virginia is explicitly clear that one non-suit taken to a cause of action or against the same party to the proceeding is a matter of right. Petitioner took a non-suit early in the proceedings of August 18, 2004 on a Third Party Motion for Judgment for which she was the Plaintiff. Under the Code of Virginia (Title 8.01-380) and finding of the Supreme Court of Virginia the plaintiff has an absolute right to one non-suit and neither the trial court nor the opposing counsel can prevent him from doing so. *Nash v Jewell*, 227 Va. 230, 315 S. E. 2d 825 (1984) *Bremer v Doctor's Bldg. Partnership*, 251 Va. 74, 465 S. E. 2d 787 (1996)

The court disallowed the non-suit based on an erroneous ruling in another court in the Hampton Circuit as he stated at the hearing and proceeded with the hearing over the objection of the Petitioner.

On October 7, 2004 the court entered an order stating, "the court found that plaintiff did not request issuance or service of process by the Clerk's Office and that the Clerk had never issued process." On which petitioner filed a motion for rehearing based on the affidavit of Joyce Hopson (Exhibit 2) and the Code of Virginia at 8.01-380. When the court failed to answer the Motion, neither to grant nor deny; petitioner filed an Extraordinary Writ of Mandamus and Writ of Prohibition, to which the Supreme Court of Virginia stated was not available to her and that she would have to use the normal appellate procedures. However, under the Virginia Supreme Court Rulings an order of a non-suit is not be considered a final judgment for the purposes of appeal under Title 8.01-670 and petitioner's non-suit was not ordered, it was ignored. (See Exhibit 2) *McManama v. Plunk*, 250 Va. 27, 458 S. E. 2d 759. In addition the Motion for a Rehearing on the failure to allow

the non-suit was properly filed and ignored, thereby tolling the time for appeal.

The Office of the Attorney General argued that the decisions made by the trial judge in this case required the exercise of judgment and discretion. However, there is no discretion in a non-suit, it is a matter of right. Unfortunately, the Supreme Court of Virginia agreed with the Office of the Attorney General.

Petitioner filed for a rehearing based on the erroneous ruling and an affidavit from a witness (Exhibit No. 2) who was present in the judge's chambers where he made his ruling without a clerk present and without admitting other witnesses. A Motion for a Rehearing under the Virginia Code tolls the time for taking an appeal. The trial court never granted or denied the Motion for a rehearing. There fore there was no regress until a final order was issued in this case. And as ordered by the Supreme Court of Virginia, this action would have to take the normal appellant process.

As the trial court attempted in this case, *MacManama v. Plunk*, 250 Va. 27, 458 S.E. 2d 759 (1995) states that the trial court cannot add limitations by judicial fiat. *The trial court erroneously placed limitations on the plaintiff's right to the voluntary non-suit when it ruled that defendant "must first had been served with process, must have been before the court with jurisdiction over the defendant's person, and the defendant must have been given notice of hearing and an opportunity to be heard." None of these requirements is found in the applicable statutes and a court should not add them judicial fiat.*

The effect of a non-suit is to put an end to the pending litigation without prejudice to either party. *Alderman v. Chrysler Corp.*, 480 F Supp. 600 (E. D. Va. 1979). What the trial court did was create undue prejudice on the petitioner and decide her case on pre-trial motions which should not have been allowed when a non-suit was taken.

2.

This case was found on the final judgment on a Summary Judgment on Admissions for which there was no evidence that they even exist or what admissions the petitioner was ask to admit to. There is no evidence there were ever presented to the petitioner and even it they were mailed, they were never filed with the Clerk of Court as required under the Supreme Court Rules of Virginia @3:A:21(b),

There is no Request for Admissions in the file of the Circuit Court for the City of Hampton. Any papers required to be served shall be filed with the clerk under the Supreme Court Rules of Virginia 3A:21(b). A Request for Admissions must be answered within twenty-one days, therefore must be served on the parties and a copy filed with the clerk.

All excerpts are from the transcript of the hearing of June 20, 2006:

Mr. Eliades stated "……..on behalf of the plaintiff "*I submitted*" (emphasis added) a request for admissions to Ms. Fromal on or about November 19, 2004." (Transcript pg 3, lines 15-16). This is an admission that request for admissions was not served, even by mailing, as required by Supreme Court Rule 3A:21(b). He further states "Moreover, we've had approximately a month since our last meeting or hearing with Your Honor wherein Ms. Fromal could have contacted me and asked if you had it. She could have requested the Court's file and found my request for admissions that are in there because they're attached to the summary judgment motion (Transcript pg 8, lines 15-20).

The court record shows that on December 17, 2004 Mr. Eliades filed "Plaintiff's Motion for Summary Judgment and Motion to Dismiss Counterclaim". Attached to it was "Plaintiff's Motion for Summary Judgment and Motion to

Dismiss Counterclaim". These are recorded in the Trial Record at pages 181-184.

There is not one scintilla of evidence before the court on the Warrant or the Counterclaim. The Honorable W. C. Andrews, III states "The only thing I have is what's before me, and based on the motion for summary judgment and motion to dismiss the counterclaim, and pursuant to the Rule 3:8 that's made, promulgated and provided by the Supreme Court of Virginia, the Court hereby grants the motion for summary judgment and also the motion to dismiss the counterclaim." (Transcript pg 10, lines 23-25 & pg 11, lines 1-4).

Not only did the trial court have nothing in the file on which to base its decision, but also the Supreme Court of Virginia states that their decision is on a review of the records. The record certainly shows that no Request for Admissions was ever filed under the Rules of the Supreme Court of Virginia, that no notice of the hearing of June 20 2006 was ever filed, that no notation of such a hearing is noted in the pre-trial Order, that time for acting under such a motion had expired under the local Rules of Court and that the respondent filed a Praecipe.

During the time that the respondent claims to have served petitioner with Request for Admissions. The petitioner and respondent had a number of correspondences. (See Exhibit 3) One such correspondence is in the exhibits dated December 2, 2004. There are a number of these letters and the first letter was from the petitioner asking respondent to supply dates for depositions of a representative of Tasa, Inc. and Dr Bernstein for whom payment was stopped for misrepresentation and fraud. That letter was sent to respondent on November 15, 2004. To which respondent's attorney replied that he never agreed to make his clients available for depositions. And he refers to his letter of November 17, 2004 in his December 2, 2004 letter. In none of the correspondence during this time does he make mention of any request for admissions.

3.

Respondent filed the Praecipe. By its own proclamation, the respondent announced to the petitioner and the court, I am ready for trial on the merits. Followed by the Praecipe, respondent filed the NOTICE, in which it states," I will appear on May 4, 2006 at 3:00 p.m. before the Honorable Judge of this Court for the pretrial conference in this matter for the purposes of setting a trial date." The conference was held and the Order signed. The following day the Order of Referral was issued to a judge for mediation and the respondent filed a list of Experts. After that point in time the docket summary posted to the Internet was changed and a hearing noted for June 20, 2006. There is no such hearing mentioned in the pre-trial order and no notice of such a hearing was ever notice. After finding this hearing on the internet, petitioner filed a Removal to Federal Court for violation of petitioner's right to a fair trial and violation of civil rights, which was acknowledged in the transcript but ignored.

Proper procedure and notice was not followed even if petitioner had not been pro se, but the rule of law exist that demands instructions and proper notice especially when an litigant is acting pro se.

4.

The respondent files a Demurrer on 05-16-03 which was denied on 5-19-04. The petitioner never amended the original counterclaim after the filing of the first demurrer taken by the initial respondent. The court however, allowed respondent to file a second Demurrer and acting on the second Demurrer dismissed three of petitioner's counts over objection that a second Demurrer should not be allowed. 11-10-04 (pg 178-179) **Order Sustaining Plaintiff's Demurrer in part and Overruling in Part.**

The court ignored petitioner's demand for a non-suit of right as allowed by the Code of Virginia, ignored the properly and timely filed request for a Rehearing and ignored by Writ of Mandamus petitioners right to an interlocutory appeal of the failure to honor the taking of a non-suit. On appeal to the Supreme Court of Virginia, the court ignored the requirements for notice, the requirements of filing pleading with the clerk of the court and for these reasons this case should be remanded for a fair trial.
The courts complete disregard of the Rules of Court of the Supreme Court of Virginia, the Code of Virginia and the local rules is a complete violation of petitioner's Constitutional Rights, as explicit in the Fifth and Fourteenth Amendments.

The simple act of the denial of the first non-suit of right should alone be grounds for remand. The simple act of ignoring the Motion for Rehearing based on the sworn affidavit of a witness should be grounds for a remand. Holding a hearing and ruling on motions not served should be grounds for a remand.

CONCLUSION

The Petitioner prays this court to issue Writ of Certiorari to the Supreme Court of Virginia with direction to the Circuit Court of the City of Hampton to issue a non-suit as taken by the petitioner and allow petitioner the statutory time to re-file the suit.

The Petitioner prays this court to issue a Writ of Certiorari to the Supreme Court of Virginia with direction to the Circuit Court of City of Hampton to vacate the Order of July 7, 2006, awarding Summary Judgment and dismissing the Counterclaim.

The Petitioner prays this court to issue a Writ of Certiorari to the Supreme Court of Virginia with direction to the Circuit Court of City of Hampton to vacate the Order of November 10, 2004, 11-10-04 (pg 178-179) Order Sustaining Plaintiff's Demurrer in part and Overruling in Part.

Respectfully submitted

Patricia W. Fromal
Pro Se

No. _____

In The Supreme Court of the United States

PATRICIA W. FROMAL,

Petitioner,

v.

TECHNICAL ADVISORY SERVICE,
THE TASA GROUP, INC.,
CHARLES RAWLING, MD,
JOSEPH BERNSTEIN, MD
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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

APPENDIX

Patricia W. Fromal
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(757) 244-3326

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

Virginia

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday ***the*** 1st ***day of*** May, 2007.

Patricia Watkins Fromal, Appellant,

Against Record No. 062056
Circuit Court No. CL03003308-00

Technical Advisory Service, et al.,

From the Circuit Court of the City of Hampton

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly the Court refuses the petition for appeal.

A copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ signature illegible

Deputy Clerk

Exhibit No. 1

Affidavit of Joyce Hobson
on Hearing of August 18,2004

I, Joyce Hobson, do attest and affirm that I did attend the entire hearing before Judge Wilford Taylor, Jr. in the matter of Tasa vs. Patricia Fromal and Fromal vs. Charles Rawling, et al on August 18, 2002. I also attended the entire hearing on August 11, 2004 before Judge Louis Lerner in the matter of Patricia Fromal v. Benjamin van der Spuy, et al. I did not attended in an official capacity however, simply attended in moral support of a friend. I am a citizen of Hampton for the past thirty-five years I am a thirty four-year veteran educator and have been politically active in the community for that entire time.

My observation is limited to the actions in the courtroom without any knowledge of the underlying cases or history outside of the events of those days. I observed during the August 18th hearing:

- that Judge Taylor made a conference call to another attorney regarding this case, who did not appear, and for whom Judge Taylor waited for his call back thirty minutes later .
- that Judge Taylor ascertained his direction from the two opposing attorneys who were present at the hearing.
- that the opposing attorneys were basically allowed to do the initial presentation;
- that Judge Taylor took the position that he should permit those attorneys to characterize the case and established the rules of the hearing based completely on their presentation and ".... superior knowledge of the law";

Exhibit No. 2

- that Judge Taylor repeatedly denied Mrs. Fromal the right to present any points ;
- that Judge Taylor would not let Mrs. Fromal counter any points related to their points
- that Judge Taylor denied equal opportunity to present argument;
- that Judge Taylor took the documents of cases that Mrs. Fromal brought without allowing argument and without reading them;
- that Judge Taylor looked toward the opposing attorneys for direction, and stated , "…..was not going to redirect any decision of Judge Lerner's , based on the hearing of August 11th"; and
- that Mrs. Fromal attempted to enter a non-suit before Judge Taylor's final determination , which was denied.

I was simply amazed that in a court proceeding that both sides were not given an equal opportunity to be heard and therefore did not have the same access to fairness.

/s/ Joyce B. Hobson .

State of Virginia: to-wit:

The foregoing instrument was acknowledged before me this 12 day of October 2004, by Joyce Hobson.

/s/ Carol Y. Jones .

My commission expires: 10/31/04 .

The Eliades Law Firm, P.L.L.C,
Attorneys and Counselors at Law
731 West Broadway
Hopewell, Virginia 23860-1007
December 2, 2004

Ms. Patricia Fromal
119 Wythe Crescent Drive
Hampton, Virginia 23661

Re: TASA v. Fromal,
Hampton Circuit Court Law No. CL0300308-00

Dear Ms. Fromal:

In response to your letter of November 22nd, and your assertion that you "will be utilizing every avenue open to (you)," please be so kind as to advise whether you have sought, or intend to seek, an "interlocutory appeal" of the Court's dismissal of three (3) of the four (4) counts of your counter-claim against my client. As stated in my previous letter to you, I must know of your intentions so as to determine how, or whether, to proceed with your demand for jury trial pending the disposal of your appeals.

Your prompt attention to these matters is solicited.

Cordially,

/s/ P. George Eliades, II

P. George Eliades, II

Exhibit No. 3